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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 12th August, 2021

\+ **O.M.P. (COMM) 232/2021 & I.As. 10086-90/2021.**

SOLAR ENERGY CORPORATION OF INDIA LTD .... Petitioner

Through: Mr. Bharat Sangal, Senior Advocate with Ms. Anindita Deka, Advocate.

versus

M/S MBP SOLAR PVT LTD .... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. By way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'the Act'), the Petitioner assails the majority award dated 27th January, 2021, whereby two out of the three members of the learned Arbitral Tribunal have allowed refund of Performance Bank Guarantees (in short 'PBG'), reimbursement of BG Commission charges, and loss of interest on margin money to the Respondent [being the Claimant therein].

2. Briefly stated, the factual matrix giving rise to the present petition is as follows:

2.1. The Government of India, through Ministry of New and Renewable

Energy, issued guidelines dated 4th August, 2015 for implementation of '*Scheme for setting up of 2000 MW Grid-Connected Solar PV Power Projects under Batch III of Phase-II of the Jawaharlal Nehru National Solar Mission'* (in short 'the JNNSM'). The Petitioner – Solar Energy Corporation of India Ltd. – was made the implementation agency (only for the "*Scheme for setting up of 2000MW of Grid connected Solar PV Power Project under Batch-III of Phase-II of JNNSM with Viability Gap Funding support from National Clean Energy Fund"*) and accordingly, it issued a Request for Selection dated 15th February, 2016 to the interested bidders including the Respondent.

2.2. Being a selected bidder, the Respondent was issued Letter of Intent dated 2nd July, 2016 ('LOI').

2.3. As a pre-condition for entering into an Power Purchase Agreement ('PPA'), the Respondent submitted PBG for an amount of Rs. 12 crores on 1st August, 2016.

2.4. On 21st September, 2016, parties entered into PPA with the Scheduled Commissioning Date ('SCD') as 2nd September, 2017. In terms of Article 2.1 of the PPA, the effective date was 2nd August, 2016, although the agreement was signed on 21 September, 2016.

2.5. Respondent, through several communications, requested for extension of time for the Commercial Operation Date (which is distinct from SCD as per the PPA).

2.6. On 6th September, 2018, the Petitioner issued a show-cause notice to the Respondent as it had not set up the Power Plant or commissioned the same by the SCD i.e., 2nd September, 2017.

2.7. The project did not take off as per schedule; the power plant was not set up. Petitioner encashed the PBG on 14th September, 2018.

2.8. Petitioner subsequently terminated the PPA vide Letter dated 25th September, 2018, although the same already stood expired by efflux of time. Respondent invoked arbitration and the Arbitral Tribunal entered upon the reference on 9th December, 2018.

2.9. After completion of pleadings and leading of evidence, at the stage of final arguments, the Tribunal called upon the Respondent to state whether it was interested in obtaining an extension of time; as the whole case was originally premised on the ground that had Respondent been given six months' extension it would have completed the project. However, the Respondent categorically stated that it was not agreeable to reviving the project and commissioning the plant at the ruling rate. It is also recorded that the Petitioner too was also not prepared to extend the time and to revive the project. Thus, the Tribunal noted, that prayer A of the Respondent, for revival of the original PPA with the same tariff, does not survive; and Prayer B also became infructuous as the Respondent was not interested in reviving the project. Therefore, only prayer C for monetary claims survived.[1]

2.10. The Arbitral Tribunal passed the award comprising of the impugned Majority Award and a Minority Award. The Majority Award disallowed all the claims of the Respondent except for Claim No. 2, whereby it directed the Petitioner to refund the BG amount encashed by it on 14th September, 2018 with interest @ 8% w.e.f. 14th September, 2018 after deducting three fourth of the cost incurred by the Petitioner in the arbitration proceedings. The award was to be complied with, within three months from the date of the award, failing which the Respondent is to be held entitled to interest @ 10% till the

[1] Paras 14 to 16 of the impugned award.

date of realization. The Minority Award dissented with the above and rejected all the claims of the Respondent.

2.11. Aggrieved by the afore-said part of the Majority Award, the Petitioner has filed the instant petition.

Petitioner's Contentions

3. Mr. Bharat Sangal, Senior Counsel for the Petitioner, contends that the impugned award is perverse and patently illegal, being contrary to the settled position in law, and is therefore, liable to be set aside.

4. Mr. Sangal argues that the Majority Award has erroneously held that invocation of the PBG by Petitioner was invalid, on the following grounds:

4.1. The Respondent had to undertake and obtain all consents, permissions and approvals within the stipulated time at its own costs and risks under Article 3.1 and 4.1 of PPA which it admittedly failed to do.

4.2. The Arbitral Tribunal has erroneously held that the PPA mandated timely and phased invocation of the PBG which was not complied with by the Petitioner.[2] He submits that a conjoined reading of Articles 3.2.1, 3.3.3 and 4.6 of the PPA substantiates that non-compliance of the requirements under Articles 3.1 and 4.1 entitled the Petitioner to take action under Articles 3.2 and 4.6. The Petitioner had invoked the PBG under Article 4.6 of PPA towards liquidated damages and it is not mandatory for the Petitioner to invoke the PBG only under article 3.2 of PPA. Article 3.3.3 stipulates that if Respondent fails to commence supply of power from SCD, the Petitioner shall encash the PBG, however it does not imply that the Petitioner shall encash the PBG on

[2] Paras 50 to 53 of the impugned Award.

the SCD itself. Encashment of PBG is for damages payable for the number of days delayed in the actual date of commissioning supply of power from SCD. The delay begins when the SCD ends, and therefore PBG could not have been encashed on SCD itself.

4.3 The Arbitral Tribunal failed to appreciate that a mere reference to LOI in the Invocation Letter cannot be a basis to conclude that the PBG was invoked in violation of LOI. It lost sight of the fact that the PBG pre-dated the PPA. Thus, at the time of invocation of the PBG, a reference was made to the LOI in the Invocation Letter. Nevertheless, the fact remains that the PBG issued under the LOI was also valid for fulfillment of obligations under the PPA. Therefore, the Majority Award has returned an erroneous finding on this issue.

4.4. Article 4.6 of the PPA does not mandate that the payable damages have to be recovered by encashing proportionate PBG at the end of that month or on a *pro-rata* basis. It does not provide that failure to do so will preclude the Petitioner to claim damages or amount to a deemed waiver or condonation of delay. Articles 3.3.3 and Article 4.6.1 enable the Petitioner to encash the PBGs. There was no option available to the Petitioner to waive or condone the payable damages; rather, there is an option of deciding when to encash, as these two Articles do not mandate that PBG had to be encashed at a specific point in time.

4.5. Article 4.6.2 provides a maximum period of 25 months for commissioning the project. The Petitioner therefore had time till then to compute and obtain the payable damages by encashing the PBGs. Therefore, the Petitioner's action of claiming the damages by encashing the PBGs after considering the status of the project at the end of 25 months is completely in

accordance with PPA. Further, the period of 25 months provided in Article 4.6.2 is the maximum time for commissioning of the full project capacity, that is, beyond 13 months from the effective date of PPA; 12 more months were already provided without the requirement for the Respondent to seek extension beyond 13 months or for the Petitioner to give extension, with or without encashing PBG in a phased manner. Therefore, there was no mandatory requirement provided in the PPA for timely and phased reductions of PBGs. Significantly there was no provision for waiving or condoning payable damages, that reduction in pre-fixed tariff is in addition to payable damages and that an additional 12 months for completing the project was part of PPA and therefore there was no requirement to give extension or to encash the BG.

4.6. The Arbitral Tribunal in para 55 had observed that the Petitioner had proposed to return the PBG to the Respondent on payment of liquidated damages. As per Article 4.6.1 (a) and 4.6.1 (b), a delay beyond 3 months from SCD not only attracts reduction in pre-fixed tariff, but also damages. By the end of the 16th month, the Respondent had already forfeited the PBG. The Petitioner could not have offered to return the PBG since there is no such provision provided in the contract to condone or waive the same. The offer or proposal has been misinterpreted to mean that the Petitioner was agreeable to levy of liquidated damages at the reduced tariff. As the power plant was not even commissioned, there was no question of reduced tariff and the Petitioner was entitled to the entire amount of PBG as liquidated damages.

4.7. The findings of the Majority Award with respect to the Petitioner not having suffered any loss, are untenable. Clause 4.6 of the PPA provides the formula/methodology for genuine pre-estimate of damages. The relevant

factors in invoking the provisions of Clause 4.6 are quantum of delay and electricity. Electricity is a utility service being provided by the Petitioner. It is neither practical nor possible to compute damages for all tangible/ intangible losses with reference to any utility where hundreds and thousands of the users/consumers are dependent upon such utility services.

4.8 The Arbitral Tribunal failed to appreciate that the Respondent was unsuccessful in completing all the requirements under the PPA and the Project had not started at all, nor commissioned, and that the Respondent became liable for payment of liquidated damages in terms of PPA. It also failed to appreciate that encashment of the PBG was a known consequence to the Respondent, and the same was within the agreed terms of contract between the parties. It is a settled principle of law that in a contract if an amount has been agreed between the parties to be paid in case of default, the party alleged to have suffered a loss is entitled to recover the agreed amount mentioned towards liquidated damages, and such aggrieved party, under Section 74 of the Indian Contract Act, 1872, would be required to receive such reasonable compensation without having to establish actual loss or damage suffered in order to recover the same. Thus, in this regard, encashment of the PBG submitted by the Respondent was valid and consistent with the provisions of the contract i.e., the PPA.

4.9. It is settled in law that if the prescribed quantum of damages in the agreement is the genuine pre-estimate there is no obligation to prove the loss. In cases where it is difficult or impossible to compute the actual loss suffered as a result of breach of contract, as in the present case involving supply of a public utility service, a genuine pre-estimate of damages, as provided in the contractual terms, would be treated as a measure for reasonable compensation

for liquidated damages to be awarded. In support of his submissions, reliance was placed upon judgments of the Supreme Court in ***Maula Bux v. Union of India***;[3] ***Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd***;[4] ***Bharat Sanchar Nigam Limited v. Reliance Communications Limited***;[5] ***Kailashnath Associates v. DDA***;[6] ***Construction & Design Service v. DDA***,[7] wherein it was held that in those cases where it is impossible to calculate the loss especially in cases of public utility (like electricity generation and distribution) the amounts stipulated in the contract have to be treated as genuine pre-estimate of damages to which the aggrieved party is entitled to. Reliance was also placed upon judgment of the Supreme Court in ***Raymond Ltd. v. Madhya Pradesh Electricity Board***,[8] and Calcutta High Court in ***Anand Construction Works v. State of Bihar***,[9] to state that in cases involving generation, distribution and supply of power, it is impossible to calculate the losses suffered due to delay in setting up of the power plant.

4.10. The impugned Majority Award is contrary to 'public policy' as defined under Section 34 of the Act, being in violation of the substantive laws, and in opposition to the terms of the contract between the parties and usage of the trade applicable to the transaction. The award also suffers from patent illegality and is therefore against public interest and is liable to be set aside under Section 34(2)(b)(ii) of the Act.

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[3] (1969) 2 SCC 554 at para 6.

[4] (2003) 5 SCC 705 at paras 67 & 68.

[5] (2011), 1 SCC 394 at para 45 to 49.

[6] (2015) 4 SCC 136 para 43.6.

[7] (2015) 14 SSC 263, at para 14.

[8] (2001) 1 SCC 534.

[9] AIR (1973) Cal 550.

4.11. The Tribunal erred in its finding that no loss or damage had occurred or suffered by the Petitioner account of non-execution of the project by Respondent. In this regard, it was submitted that there is at least a minimum loss of trading margin of 7 paise per Kwh (irrespective of tariff) because of non-supply of electricity which will convert to around Rs. 10 to 12 crore on the basis of contracted capacity (Article 4.4 of PPA). It is further submitted that under the provisions of Electricity Act, the discoms are bound to utilize power from 'new and renewable sources' upto the prescribed extent and failure to generate the contracted amount of power would lead to adverse circumstances.

Findings

5. Mr. Sangal, Senior Counsel, has strenuously argued that the findings of the Arbitral Tribunal, relating to interpretation of the terms of the Contract *qua* the Petitioner's right of invocation of the PBG, are perverse in so far as the tribunal has erroneously held that the invocation is invalid. It was argued that Claim No. 2, which has been allowed in favour of the Respondent, is perverse, illegal and contrary to the relevant provisions of the contract. He emphasizes that since the Respondent failed to commission the project or supply any power at all – the Petitioner was entitled to liquidated damages as per the provisions of Article 4.6 of PPA, and thus, its invoked the PBG under the said clause was completely valid.

6. The Arbitral Tribunal has held that, *inter alia*, the PBG was encashed for violating the LOI even before the termination of the Agreement – as can seen from the letter addressed to the Bank. That apart, the Arbitral Tribunal has, on the basis of the materials placed on record, held that the Petitioner did

not invoke its power to impose penalty and encash the PBG.[10] Then the Arbitral Tribunal has also dealt with the Petitioner's right of invocation towards liquidated damages.[11] On this aspect, the Arbitral Tribunal held that:

> "*Once the Respondent decided not to impose the penalty by encashing the PBG either under Article 3.2.1 or under 3.3.3, the question of levy of Liquidated Damages does not arise at all. Without setting up a Plant within seven months of PPA and commissioning it within thirteen months on the defined date of 02.09.20 17, there arises no question of Liquidated Damages for non-commencement of power supply even partially*."

7. These finding are factual, based on interpretation of terms of the contract. It is well settled that construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.[12] Keeping that principle in mind, the court does not find any merit in the grounds of challenge relating to the Arbitral Tribunal's interpretation of the terms of the PPA for arriving at the finding that the invocation was invalid.

8. Having said that, we can note that the Arbitral Tribunal has also examined the Petitioner's right of invocation, without terminating the agreement, even after the expiry of the period for the milestones contemplated under the agreement.[13] On this issue, the Arbitral Tribunal held that the PBG could be invoked at the stage of failure in achieving the milestones contemplated under Article 3.2, 3.3 and then under 4.6.1 towards liquidated damages in a phased manner. The Arbitral Tribunal noted that since no action

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[10] Paras 59 & 60 of the impugned award.

[11] Paras 55, 61 to 70 of the impugned award.

[12] *See:* ***Associate Builders v. DDA***, (2015) 3 SCC 49.

[13] Para 65 of the impugned award.

was taken by the Petitioner to terminate the contract and encash the PBG under such provisions, the Respondent was permitted to continue at the site and take steps under PPA. In this background, it was observed that:

> "65. (…) *Even if we take it as failure to perform the obligations under the PPA also, the Respondent itself, having chosen not to do it at the two mandatory stages under Article 3.2 and 3.3, resulting in an express estoppel by conduct of its right to impose penalty by invoking Bank Guarantee, there cannot be encashment of Bank Guarantee thereafter even as liquidated damages.* (…) *And Article 4.6 Liquidated Damages is not for commencing the supply to the contracted capacity.*"

9. Before this court, stress has been laid that Article 4.6 of the PPA provides for a genuine pre-estimate of damages, as agreed between the parties, to be paid by Respondent in case of any delay in supply of power as per the terms of the contract. It provides for the formula / methodology for genuine pre-estimate of damages. The quantum of delay and the quantum of electricity are relevant factors in operating the provision of Clause 4.6. Mr. Sangal contends that electricity is a utility service being provided by it, and thus, it is neither practical nor possible to compute damages for all tangible / intangible losses with reference to any utility where hundreds and thousands of users / consumers are dependent upon such utility service; therefore, there was no obligation on the Petitioner to prove the loss.

10. For the sake of argument, even if we assume that under Article 4.6 of the PPA (which deals with Liquidated damages for delay in commencement of supply of power) the Petitioner was entitled recovery towards pre-estimated damages, the preliminary and foremost question which arises is – has this stand been consistently taken by the Petitioner before the Arbitral Tribunal? On a query by the court on this issue, Mr. Sangal very fairly

submitted that this issue was brought up only at the stage of final arguments, and not at an earlier stage. He explained that the case proceeded on a different premise and only when a query was raised by the Arbitral Tribunal, as to whether the Petitioner had proved loss, were detailed written submissions filed by the Petitioner to explain the intent behind Article 4.6 elucidating as to how the provision was a genuine pre-estimation of loss.

11. In its statement of defense filed before the Arbitral Tribunal, although the Petitioner has contended that the PBG was encashed towards liquidated damages, however, it has not put forth the case that the damages so recovered, were a pre-estimated loss – or that Petitioner could not have or was not required to prove such loss. The law on the issue of pre-estimation of damages – as borne out from the provisions of Sections 73 and 74 of the Indian Contract Act, 1872 – is well settled, in view of several judicial pronouncements of the Supreme Court as well as this Court. Only when a genuine pre-estimate of damages for breach of contract is provided in a contract, would the party complaining of breach be required to receive such reasonable compensation, whether or not actual damage or loss is proved to have been caused thereby. Whether indeed the Petitioner had suffered any loss, and whether Article 4.6 entitled the Petitioner to recover such pre-estimated loss by invocation of PBG – without the proof of loss – was required to be pleaded before the Arbitral Tribunal.

12. The Petitioner does not deny the fact that it did not place any material on record to prove that it had actually suffered loss. Petitioner's sole contention is that the clause itself builds up a mechanism for calculating pre-estimation of loss, and therefore, it was entitled to invoke the PBG, and there

was no obligation to prove such loss, since Section 74 provides for award of reasonable compensation for damage or loss caused by a breach of contract.

13. Indeed, damage or loss is a *sine qua non* for the applicability of the section 74. The expression found in the said provision, "*whether or not actual damage or loss is proved to have been caused thereby*", means that where it is possible to prove actual damage or loss, such proof is not to be dispensed with.[14] Thus, it was imperative for the Petitioner to have pleaded that it had suffered loss, and the amount recovered under the PBG is towards reasonable compensation under a pre-estimation clause. Petitioner was also required to establish that the clause stipulates a 'genuine pre-estimate' of damages, as fixed by both parties, and meets the test of pre-estimation as was in the case before the Supreme Court in ***ONGC v. Saw Pipes Ltd.*** (*supra*).

14. Keeping that in view, the Court has examined the findings of the Arbitral Tribunal on the question of invocation of the PBG, relevant portion whereof reads as under:

> *"68. A reading of these provisions (Sections 73 to 75) would show that these provisions have not laid down the mode and manner as to how and in what manner the computation of penalty or damages or compensation has to be made.* ***The moment the term "damages" is referred to, there is a corresponding obligation on the part of the contracting Party invoking the steps for recovery to show that it had also suffered actual loss. Not only that there is no Counter-Claim, there is no pleading regarding any loss suffered by SECT on account of non-execution of the Project by the Claimant****. The Tribunal refers to this aspect because in the factual scenario, the Respondent and the State, for that matter, only stood to gain humongously on account of the non-performance of the obligations by the Claimant. Had the Claimant commissioned its Project by 02.09.2017 or even by 02.12.2017, the Respondent and the State were bound to pay the Claimant @ Rs. 4.43 per kW for 40 MW for 25 years. On commissioning beyond 02.12.2017 but before 02.09.2018, there was proportionate*

[14] *See*: ***Kailash Nath Associates*** *(supra).*

reduction in tariff. The ruling tariff in 2018-2019 was only around Rs. 2.36, and in any case varying from Project to Project, below Rs. 3 per kW. Therefore, the Respondent and the State have only huge gain on account of the failure on the part of the Claimant in performing its obligations. The PBG invoked has been credited by the Respondent to the Payment Security Fund only and not for compensating even a theoretical loss. The capacity allotted to the Claimant is made up in subsequent projects and the Respondent gets its commission. The Tribunal is hence also of the view that there was no justification on the part of the Respondent in encashing the Bank Guarantee. The invocation of the Bank Guarantee was also not in accordance with the PPA and hence it is held to be an invalid invocation of the Bank Guarantee.

69. Both on facts and law, the view the Tribunal has taken as above is supported by a Landmark judgement of the Supreme Court of India in Kailash Nath Associates vs. Delhi Development Authority & Anr.; [(2015) 4 SCC 136/. As a matter of fact, all the judgements relied on by both sides have been discussed in Kailash Nath (supra) and the legal position has been succinctly summarised in Paragraph 43. It is a case where in the case of a sale by auction of a plot by DDA, the successful bidder did not take the contract forward resulting in forfeiture of the earnest money deposit and re-auction of the plot. In the re-auction, the DDA got a far better gain of more than threefold of the original. These factual aspects have been summarised in Paragraph 42 and 44."

[Emphasis supplied]

15. Therefore, even if the invocation of PBG is construed to be under Article 4.6, the Petitioner has failed to fulfill the requirement of law for being entitled to the amount thereunder. Besides, in the opinion of the Court, the view taken by the Arbitral Tribunal cannot be held to be perverse or patently illegal, which would warrant an interference of this Court under Section 34 of the Act.

16. The instant case does not meet the test laid down in several judicial pronouncements of the Supreme Court, defining the narrow scope of jurisdiction of a Court under Section 34. It does not fall under those exceptional cases where the reasoning of the Arbitral Tribunal demonstrably shocks the conscience of the Court. For these reasons, the court does not deem

this to be a fit case for interfering with the impugned Award.

17. Dismissed. All pending applications are also disposed of.

SANJEEV NARULA, J

AUGUST 12, 2021
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(corrected and released on 03rd October, 2021)